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JUSTICE, HUMANITY AND THE NEW WORLD ORDER

By Ian Ward
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I INTRODUCTION: WARD'S VIEW OF THE WORLD

Looking at the world at the beginning of the twenty-first century, Ward sees a forbidding place: hopes of a new world order of democracy, liberty and human rights, kindled by the collapse of communism in the early 1990s, had to be buried as the world witnessed 'the most gruesome acts of inhumanity across the globe'. To Ward these ills are not new, they are the hallmark of the whole of the twentieth century with its two disastrous world wars, its ideological conflicts and its fear of nuclear annihilation. Albert Camus called the twentieth century 'the century of fear' in which humanity was living in a kind of 'suspended animation, trapped between hell and reason'. Camus claimed that it was reason which had created 'this hell on earth, the capacity for oppression, exploitation and destruction'.¹ Globalisation, rampant capitalism without effective curbs and controls, compounded the horror which was the twentieth century. The 'cold calculation of the market' has combined with the 'brutal unsentimentality of the law'² to create a landscape which has little scope for sentiments of compassion and in which humanity cannot feel at home.

Ward's imagery may seem like a grotesque distortion to the inhabitants of affluent suburbs in Western cities. During the twentieth century, there has been spectacular scientific and technological progress in developed countries in many fields. Yet, satisfaction with the course of human development during the past ten or so decades is achievable only if one ignores the endless calamities which have befallen countless numbers of one's human brothers and sisters. There is no dearth of misery even in the midst of affluent societies. Ward speaks of a 'constituency of the rejected'³ and quotes the psychologist Oliver James to show the current state of society as promoted by a philosophy of 'spurious individualism':

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¹ Ian Ward, *Justice, Humanity and the New World Order* (2003) 14.

² Ibid 2.

³ Ibid 146.

[H]umanity has been infected by an epidemic of irritability and aggression, of depression and paranoia, of obsessions, panics, addictions, compulsions, relationships that are not working, careers that dissatisfy, an outbreak of living in the future and pathological re-enactment of the past.⁴

If one remembers the inmates of Nazi concentration camps, the Muslim men of Srebrenica, the Tutsi who were slaughtered in Rwanda, the men and women who perished in the World Trade Centre, Ward's view of the world no longer seems implausible.

II LAW AND JURISPRUDENCE AT THE BEGINNING OF THE 21ST CENTURY

According to Ward, reason gone wrong and the resulting law and jurisprudence are at the centre of our troubles. One of Ward's crown witnesses is Franz Kafka, whose novel *The Trial* presents law as the ultimate expression of delusive hopelessness, of the failure of modernity, of brutalising force and compulsion. Having surveyed our current jurisprudential landscape, Ward considers that, in an age of globalisation, our current ideas of what amounts to law lack legitimacy. Legal theory, in particular the unhappy and continuing legacy of positivism, has played its part in causing the promise of the Enlightenment, the hope for an 'ever more acute sensibility to human pain and suffering',⁵ to have been lost.

Ward's explanation of the sickness of our jurisprudence moves to a rather arcane and abstract plane: two indispensable components, sense and sensibility, have lost the necessary balance. Legal thinkers have overemphasised sense or reason and have underemphasised sensibility, the noble sentiment which bestows tranquillity, happiness and contentment on communities. Invoking the age-old tension between law and justice, cast into literary form by Sophocles' *Antigone* and Shakespeare's *The Merchant of Venice*, Ward asserts:

[M]odern legal and political thought has lost sight of the idea of justice. It has, instead, become entranced by the idea of law, of rules and regulations and rights. It is, furthermore, this particular forgetfulness, this wilful neglect of justice, and with it the cause of humanity, which has played a defining role in the fashioning of our present crisis of intellectual and moral confidence.⁶

How is it possible to conceive of a kind of jurisprudence which rekindles the hope which the Enlightenment once held out to mankind? Lawyers should turn to literature and poetry to recapture the qualities of sensibility:

⁴ Ibid 147.

⁵ Ibid 120.

⁶ Ibid 1 onwards.

[T]he future of legal theory lies in our spending rather more time with the likes of Wordsworth, Coleridge and Shelley, than with Hart, Dworkin or Rawls. In short, the time has come for legal theory to venture beyond its self-inflicted intellectual constraints.⁷

If reason severed from sensibility has done so much damage, then the hope of mankind is to re-establish a balance between these crucial elements.

III THE PROMISE OF THE ENLIGHTENMENT

What was common to the writers of the Enlightenment was the desire to preserve peace and tranquillity in a Europe racked by conflict and war, and to achieve a measure of prosperity for the many who were toiling in grinding poverty. Where they differed, it seems, is in their view of the means to achieve these lofty aims. In the literature of the Enlightenment, Ward has identified two fundamentally different strands of reasoning.

A *Rousseau, Godwin, Democracy*

The patron saint of one of these schools of thought is Jean Jacque Rousseau, ‘the arch-priest of the “cult of sensibility”’.⁸ Within this school, Ward finds much support for his thesis. He invokes Nietzsche, who is said to have stated in *The Birth of Tragedy*, that the ‘divorce of reason from sentiment was the ultimate tragedy of modernity’.⁹ Ward returns to this thought again and again.

In 1754, in his *Discourse on Inequality*, Rousseau, supported later enthusiastically by Godwin in England, put forward the view that man’s natural virtue to show compassion could provide the remedy for inequality and injustice. According to Rousseau’s *The Social Contract*, the state is formed in order to translate the ‘general will’ of citizens into the politics of the common good. The great slogan of the French Revolution, ‘liberty, equality, fraternity’, harks back to Rousseau. As Ward explains:

For Rousseau, genuine democracy lies in the facility to express compassion and respect for others, and the knowledge that such a facility is reciprocal. The thought found subsequent expression in the countless confessions of later ‘romantics’, from Goethe and Wordsworth to Trollope and Mill. For each of these, following Rousseau, the personal and the political were inseparable.¹⁰

⁷ Ibid viii.

⁸ Ibid 51.

⁹ Ibid 13.

¹⁰ Ibid 49.

The political expression of this school of thought, according to Ward, is the Jacobin revolution, which was ‘shrouded in a romantic mysticism’.¹¹ The call for liberty expressed the yearning for the lifting of the oppression of the *ancien regime*. The call for fraternity expressed the optimistic belief in human brotherliness, compassion and friendship.

The essentially anarchic theme that freedom from government restraint will liberate human virtue finds its most sublime expression in Shelley’s great poetic work, *Prometheus Unbound*. Godwin, the political philosopher and his ardent followers, the poets, Shelley and Coleridge, did not deny the importance of reason, but they sought, so Ward informs us, the essential balance of reason with sensibility. He sees the human sense of compassion as the key to a better world. Ward quotes David Hume,¹² who marvelled at the remarkable quality of men and women to ‘sympathise with others’, seeing it as a sentiment so ‘universal and comprehensive as to extend to all mankind’. Once activated, or better, restored, this sentiment will be the foundation on which to build a new kind of democracy. This theme was developed by Godwin:

Democracy . . . teaches [man], by the removal of authority and oppression, to listen only to the suggestions of reason . . . and induces him to regard [other men] no longer as enemies against whom to be upon his guard, but as brethren whom it becomes him to assist.¹³

Another, less exalted, view might see democracy as the institutionalisation of revolution, designed to prevent the deadly consequences of real revolutions. This would make the democratic majority appear, not as the embodiment of Rousseau’s ‘general will’, but as a part of society with enough muscle to launch a successful revolution. This concept would have horrified the Romantics, but it might be more realistic than theirs.

B *Voltaire, Law and Constitutions*

The chief critic of the cult of sensibility was Voltaire. Whilst Godwin attacked constitutions and law as alienating instruments of oppression, Voltaire found the essence of reason in Montesquieu and John Locke, in the English Constitution as it had grown out of the Glorious Revolution, in laws and written constitutions protecting the liberal values of the Enlightenment.

The political expression of this school of thought, according to Ward, was the American revolution with its fast developing intense belief in the essential role of

¹¹ Ibid 52.

¹² Ibid 33.

¹³ Ibid 57.

law and particularly of constitutions. One of the objectives of the men who drew up the American Constitution was to suppress those human passions which represented a danger to public tranquillity. As Ward explains: 'Prometheus needs to be bound'.¹⁴

C *Human Nature and Politics*

Ward observes that these two schools of thought held fundamentally different views of human nature.¹⁵ To the one, humans are naturally inclined to friendship and compassion, a quality which is inhibited and distorted only by the fetters of unfeeling government. To the other, humans are impelled by dangerous passions which need to be curbed by appropriate constitutional arrangements, notably by the separation of powers and the independence of the judicial system.

Referring to the philosophical mood of the 1960s, Ward observes:

A generation of radicals was enthused by the thought that the horrors of the twentieth century were not rooted in human nature, but rather were the incidental product of systems of government that could be reformed.¹⁶

At least some of these radicals were dreaming, not of Rousseau and his followers, but of communist man, that paragon who was destined to populate the Nirvana of Marx, Engels and Lenin. For this our writer exhibits no sympathy; rather, his new man resembles the creature dreamt of by the philosophy of anarchism: 'the root of our ailment does not lie in biology. It lies in politics, in the society in which we live and which makes so many of us so miserable so much'.¹⁷

If this assertion is not unrealistic, it is certainly unproven. The evidence, much of it assembled in this book, suggests that humans can be wonderfully loving and compassionate, but also possess the most fearful capacity for hatred and cruelty, for revenge and retaliation. Closing one's eyes to one or the other of these human capacities cannot lead to fruitful results. Who can doubt that the noblest task of government is twofold: to encourage the first and to assuage or suppress the second?

Great poetry, however inspired, may not be as reliable a guide as is scientific inquiry, if we wish to understand the true nature of human passions. The much maligned Thomas Hobbes made a useful beginning, when, in Chapter VI of the *Leviathan*, he compiled a list of human passions. In modern times, the work on

¹⁴ Ibid 54.

¹⁵ Ibid 53.

¹⁶ Ibid 13.

¹⁷ Ibid 147.

aggression by Konrad Lorenz, founder of ethology, and his cautious suggestions of ways in which human aggression may be curbed, has given us useful clues. Ward's book would have benefited from a survey of such scientific attempts to solve our dilemma.

IV WARD'S NEW JURISPRUDENCE

The book concludes with a call for a new humanism, for a 'humanist, and humanitarian, political philosophy'.¹⁸ Again, the author bedazzles the reader with an array of famous names and the associated philosophies, but the essence of what he envisages is coming through clearly enough. The promise of the Enlightenment was 'liberty, equality and fraternity, democracy, justice and compassion'.¹⁹ To Ward, the last of these elements is the most important. Once it has found its proper place in human affairs, democracy in the most positive possible sense, a democracy where everyone cares for everyone else, will spontaneously come into being. Democracy will then be truly inclusive and not just, in the words of Galbraith, a 'democracy of the fortunate'.²⁰

In a sense, Godwin's and Ward's vision of democracy obviates the need for reliance on human rights. However, as perfection is not attainable, the philosophy of human rights, perhaps the most important creation of the Enlightenment, is a necessary supplement to democracy. Enacting human rights into law is not enough for Ward, for law alone belongs to the legacy of Voltaire, which he rejects. He demands the translation of human rights into human culture:

A human rights culture is the necessary complement to any legalistic notion of human rights. It represents precisely the balance between sense and sensibility advocated by [Adam] Smith, or that of right and virtue advocated by Kant.²¹

One must agree that legislating for human rights or for democracy cannot be enough. Both must be culturally entrenched. There must be an acceptance by those in power that they will relinquish it when they lose an election or some other legally established title to it. In Australia, the enduring images symbolising this two-fold cultural foundation of democratic and constitutional government are former Prime Minister Malcolm Fraser shedding bitter tears in public at the loss of the election of 1982, yet conceding his defeat, and former Prime Minister Gough Whitlam denouncing his dismissal on the steps of Parliament House in 1975, yet failing to challenge it except by campaigning for re-election. Both men were endowed with

¹⁸ Ibid 148.

¹⁹ Ibid 150.

²⁰ Ibid 153.

²¹ Ibid 139.

outsized egos, both loved their positions of power, but neither defied the will of the electorate or the operation of the established Constitution. What a contrast to the pronouncement by Joseph Goebbels in August 1932, as reported by Joachim Fest: '[I]f we have the power we'll never give it up again unless we're carried out of our offices as corpses'.²² The contrast is not one of laws but of cultures. One exemplifies a civilised, the other a brute form of government. The essential distinguishing element is voluntary submission to a cultural, not just a legal, imperative.

There are many impediments to the contribution which law and jurisprudence are able to make to the development of a human rights culture. Such a culture develops most readily in societies with a modicum of prosperity. Ward quotes Galbraith²³ who has said that without food, notional rights are useless. The Islamic world finds its legal, cultural and religious inspiration in the Qu'ran and the Sunna, which, in many ways, is at odds with the ideals of the Enlightenment. There are other entrenched traditions which would lose some of their cultural substance if they were to absorb a culture of human rights in the Western sense. What gives a Western writer the right to make such demands? Such legitimate questions notwithstanding, one still expects that a culture of respect for human rights would improve the lot of humanity.

To Ward, the correct relationship between humanity and rights is to be found in the right balance between sense and sensibility.²⁴ He has unearthed a rich ancestry for this idea in Western philosophy. This inspiring vision raises the very practical question how it can be given substance in the practical affairs of a globalised world.

One answer might be to turn Ward's preferred jurisprudential outlook into a secular religion, an idea which is mentioned once or twice.²⁵ To its adherents, Communism was such a religion. Religious creeds are still proving very effective as creators of self-sacrificing attitudes to life and death, but it is difficult to see how any secular theory can ever rival the effectiveness of true religions with their elaborate rituals and their beliefs in God and in posthumous redemption.

Ward places great faith in the legacy left by the Romantic poets. In our age of pop culture, there is no hope at all that the poetic visions of Wordsworth, Coleridge or Shelley will ever inspire whole populations. Ward's hope may be that these poets will win over professors of jurisprudence, who will then succeed in having their ideas translated into practical law. However, this would be insufficient, for law alone, as Ward says, cannot solve our problems.

²² J C Fest, *Hitler* (R and C Winston, transl, 1974) 340.

²³ I Ward, above n 1, 90.

²⁴ *Ibid* 121.

²⁵ See for example, *ibid* 27 and 136.

Another possible solution might be for the state to set an example by showing concern, not only for the human rights of the victims of human rights violations, but also for those of the perpetrators. Not surprisingly, Ward sees the South African Truth Commission and the dialogue promoted by it as a shining example.²⁶

After the disaster of Nazism, the post-war German state has marked its return to the values of the Enlightenment by entrenching major human rights into the Basic Law. To be found there as major postulates are human dignity and the right of every individual to the free development of his or her personality. Ward mentions the 'third wave' of human rights, which is said to transcend the state/individual relationship and imposes obligations of mutual respect on individuals as among themselves.²⁷ He might have given some credit for this development to the German Constitutional Court, which has entrenched the idea that the constitutional rights provisions of the Basic Law have established a system of values which governs all aspects of the legal system. This philosophy has influenced the South African Constitution. Although the German Constitutional Court has to intervene frequently in the political sphere, it enjoys so much public approval that its judgments impact not just on the law but also on the culture of the country.

Like many of the literary advocates of the philosophy of anarchism, Ward has little to say about the separation of powers, but shows a distinct preference for its diffusion. Personal attitudes and political structures are regarded as so closely linked that, the more spontaneous and the closer government it is to individuals, the more humane it will be. His preferred forms of government or quasi-government are non-governmental organisations, or government at the local level. He endorses the principle of subsidiarity (what can be done by the smaller political units of a large organisation should be done by them and not by the centre), which has been gaining ground in the European Union. Ward bemoans the lack of democratic accountability of organisations like the World Trade Organisation or the World Bank, but offers few practical suggestions for change.

Freedom should not be equated with the absence of legal restraint. The preservation of freedom often requires intelligent legal regulation. The legal defence of human rights is not the only example. Freedom of competition will not survive without well designed laws which impede trade restraints and mergers. Non-governmental organisations will not impose such essential restraints. Ward has no answer to the question of how such regulation can be achieved by democratic means in a globalised economy.

²⁶ Ibid 133 onwards.

²⁷ Ibid 136.

V CONCLUSION

At times, this book seems like an anthology of the philosophical and poetic thought of the Enlightenment. Its purpose is to revive the ideas of the writers of radical democracy and of the Romantic poets and to show their relevance to today's jurisprudence. There are also many references to contemporary philosophical trends. Ward's writing conveys a perplexing mixture of despair and optimism. He disavows²⁸ any intention to provide 'a comprehensive theoretical blueprint', or 'some kind of grand unification theory of jurisprudence'. His professed aim is to put forward some constructive ideas as building blocks for a new approach to law and justice. Considering that he is concerned with some of the most important issues which humanity faces, the moderation he has shown is understandable and commendable. The book is written with an appealing sense of passion and it is not difficult to certify that it has achieved its purpose.

²⁸ Ibid vii.

